

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

SAU HUNG YEUNG

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CRIMINAL Nos. 98-28-01  
99-134-01

O'Neill, J.

November , 2001

**MEMORANDUM**

The Court of Appeals for the Third Circuit remanded this case for re-sentencing. United States v. Yeung, 241 F.3d 321 (2001).

A jury convicted Yeung of three drug charges in March 1999: 1) conspiracy to distribute in excess of 100 grams of heroin under 21 U.S.C. § 846; 2) distribution of heroin under 21 U.S.C. § 841(a)(1); and 3) distribution of heroin within 1000 feet of a school under 21 U.S.C. § 860. In a separate action, Yeung pleaded guilty to one count of possession of a firearm by a convicted felon. In December 1999, after considering a guideline range of 97-121 months,<sup>1</sup> I sentenced Yeung in both actions to concurrent prison sentences of 97 months, eight years of supervised release, and a special assessment of \$250. On appeal, the Court of Appeals vacated the sentence, determining that under Application Note 12 to U.S.S.G. §2D1.1 (1998) defendant Yeung should have been sentenced according to the amount of heroin he actually sold<sup>2</sup> instead of

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<sup>1</sup> This guideline range was based upon my conclusion that defendant Yeung and his co-conspirator had conspired to deliver 680 grams of heroin, even though only a single ounce actually was sold.

<sup>2</sup> The guideline range for Yeung's sale of an ounce is 37-46 months.

the amount he allegedly conspired to sell, which was substantially more. Yeung, 241 F.3d at 327.

The issue before me is whether the five-year statutory minimum under 21 U.S.C. § 841(b)(1)(B)(i) applies to Yeung's conspiracy conviction. The government asserts that because the jury convicted Yeung of conspiracy to distribute heroin and I determined that the amount of heroin that the defendant conspired to distribute was 680 grams I am required to sentence Yeung to the statutory minimum.

Defendant Yeung counters with three arguments. First, Yeung asserts that the Court of Appeals made a factual determination that Yeung conspired to sell only one ounce of heroin and therefore the mandatory minimum sentence under § 841(b)(1)(B)(i) for conspiring to distribute more than one hundred grams cannot apply. See Yeung, 241 F.3d at 327 (“Yeung was sentenced based on one of several quantities bandied about by he [sic] and Zheng even though the only evidence of an agreement of any kind was the one ounce actually sold.”). Second, Yeung contends that imposition of the five-year minimum would violate the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000) in which the Supreme Court held: “Other than the fact of a prior conviction, any other fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 490; see also United States v. Buckland, 259 F.3d 1157, 1159 (9th Cir. 2001) (holding that 21 U.S.C. §§ 841(b)(1)(A), (B) are facially unconstitutional under Apprendi), reh'g en banc granted, 265 F.3d 1085 (2001).<sup>3</sup> Yeung's final argument is that he cannot be sentenced under 21 U.S.C. §

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<sup>3</sup> Although defendant Yeung cites to the Buckland for the proposition that 21 U.S.C. §841(b)(1)(B) is unconstitutional on its face, in response to an argument in Yeung's brief, the Court of Appeals stated, “Given that the sentence imposed was not beyond the statutory maximum, we do not see the applicability of Apprendi to this case.” Yeung, 241 F.3d at 327 n.3. Moreover, the Court of Appeals has held that 21 U.S.C. §841(b)(1)(B) does not per se violate the

841(b)(1)(B) because the only way to salvage the constitutionality of that statute is by interpreting it not as a sentencing factor but as an element of the drug offense that must be submitted to the jury and proved beyond a reasonable doubt.<sup>4</sup> Since the quantity of drugs was not decided by the jury, Yeung argues that he was not “convicted” under § 841(b)(1)(B).<sup>5</sup>

Although the government responds to the defendant’s first argument,<sup>6</sup> it is clear that the

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rule of Apprendi. See United States v. Vazquez, No. 99-3845, 2001 WL 1188250, at \*3 (3d Cir. Oct. 9, 2001) (en banc) (“([A]n Apprendi violation only occurs if the drug quantity is not found by a jury beyond a reasonable doubt and the defendant’s sentence under § 841 exceeds twenty years.”); United States v. Williams, 235 F.3d 858, 863 (3d Cir. 2000) (holding that although § 841(b)(1) increased possible maximum sentence, because actual sentence was under 20 years, no Apprendi violation occurred).

<sup>4</sup> The Court of Appeals for the Third Circuit has determined that “post-Apprendi, drug quantity is only an element of a §841 offense when a defendant is sentenced above the default statutory maximum [of 20 years] . . . .” United States v. Barbosa, No. 00-1205, slip op. at 22 (3d Cir. Nov. 6, 2001), citing Vazquez, 2001 WL 1188250, at \*3-7.

<sup>5</sup> Yeung’s final argument also is supported by precedent from other circuits. See United States v. Westmoreland, 240 F.3d 618, 632 (7th Cir. 2001) (citing cases from circuits that have interpreted § 841(b) as containing elements of drug offenses that must be submitted to a jury in the wake of Apprendi to avoid unconstitutionality); see also Vazquez, 2001 WL 1188250, at \*12 (Becker, C.J., concurring) (“I submit that drug type and quantity are always elements of an offense under § 841, and therefore must always be submitted to the jury for proof beyond a reasonable doubt.”); United States v. Pressler, 256 F.3d 144, 157 n.7 (3d Cir. 2001), citing 21 U.S.C. § 846; § 841(a); §841(b)(1)(C) (“If the statutory interpretation embraced by our sister circuits is correct, then § 841 describes not one, but many ‘crimes,’ and the ‘crime’ for which [defendant] was convicted was conspiracy to distribute an unspecified amount of heroin . . . .”).

<sup>6</sup> The government contends that the question of a statutory mandatory minimum was not before the Court of Appeals and therefore the Court’s opinion should not apply to resentencing under 21 U.S.C. § 841(b)(1)(B).

The question before this Court, therefore, is exceedingly narrow: whether Application Note 12 to U.S.S.G. § 2D1.1 counsels that Yeung be sentenced to the one ounce completed transaction, the one unit (or one-half unit or two units) that he and Zheng would have liked to have sold to Nguyen, or the aggregated amount of one unit (or one-half unit or two units) plus one ounce.

Yeung, 241 F.3d at 324.

Moreover, the government points out in its resentencing memorandum that, although not

Court of Appeals imposed a binding determination that the defendant conspired to distribute only one ounce of heroin. See Yeung, 241 F.3d at 327 (concluding there was insufficient evidence to sentence Yeung on a conspiracy to distribute more than an ounce of heroin). The Court of Appeals stated in no uncertain terms, “[W]e base our conclusion on fact, and fact it be, that there was insufficient evidence to show an agreement to sell – and certainly, there was no agreement to buy – beyond the one ounce.” Id. The Court of Appeals having made this determination, the statutory mandatory minimum under 21 U.S.C. § 841(b)(1)(B) obviously does not apply to defendant Yeung. Therefore, I do not reach the defendant’s other arguments.

For the foregoing reasons, I will not sentence Yeung to the mandatory minimum term.

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requiring the jury to make a specific quantitative finding beyond a reasonable doubt, Count 1 contained a very detailed charge:

Count 1 is the conspiracy count. Count 1 charges that from in or about July of 1994, to on or about October 18, 1994, in Philadelphia and elsewhere, the defendant entered into a conspiracy with Ji Heng Zheng to distribute more than 100 grams of heroin in violation of Title 21, United States Code, Sections 841 and 846 . . . .

Trial tr. 3/5/99 at 107.

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**ORDER**

AND NOW, this        day of November, 2001, it is ORDERED that defendant Yeung  
will be sentenced on the 20th day of November, 2001 at 10:30 A.M in courtroom 4A.

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THOMAS N. O'NEILL, JR., J.